Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE
UNITED STATES SUPREME COURT

# 79-1750

PETITION FOR WRIT OF CERTIORARI

TO REVIEW THE JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT IN ITS
CASE NO. 79-1491

ROBERT E. FINGAR,

Petitioner,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
A VIRGINIA corporation,

Respondent.

PETITION OF ROBERT E. FINGAR
Petitioner
P. O. Box 552
Callahan, Florida
32011
Pro se

## REFERENCE

Petitioner has no knowledge of any offical or unofficial reports of the opinions delivered in the Courts below and the judgment sought to be reviewed is appended hereto in the form on which it was served Petitioner.

## GROUNDS FOR INVOKING JURISDICTION

1. Appellate Court departed from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision so that Petitioner's right to due process of law is not denied.

2. On November 16, 1979, Appellate Court rendered judgment sought to be reviewed and Petitioner has no knowledge of its entry time.

3. On February 4, 1980, Appellate Court denied petition for rehearing.

4. Petitioner belives that the Railway Labor Act, as amended, 45 USCA Section 153 First(q) confers on this Court jurisdiction to review the judgment in question by writ of certiorari.

## QUESTIONS PRESENTED FOR REVIEW

It is percieved by Petitioner that the following question along with its subsidiaries comprised therein are presented for review.

> Did the Appellate Court depart from the usual course of judicial proceedings in affirming lower Court's summary judgment and thereby denying Petitioner due process of law under that part of the Railway Labor Act, as amended which is distinguished in 45 USCA Section 153 First(q).

## STATUTE AND RULE OF PROCEDURE INVOLVED

1. That part of the Railway Labor Act, as amended and which is distinguished in 45 USCA, Section 153 First(q) at page 728 of 1972 edition and which is herein set out verbatum:

> " (q). If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code. "

2. Summary Judgment Rule 56(c) of Federal Rules of Civil Procedure which is distinguished in the 1971 edition of 28 USCA at page 413 and which is here set out verbatum:

"(c). The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment interlocutory in character may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. "

## STATEMENT OF THE CASE

Action was brought in United States District Court pursuant to the Railway Labor Act, as amended, 45 USCA, Section 153First (q) on the basis that Petitioner was grieved by the terms of the dismissal order entered by the First Division, National Railroad Adjustment Board for its Award No.21787 from its Docket No. 42273.

Petitioner distinguished genuine issues as to material facts in his pleadings before the District Court that the First Division failed to comply with the requirements of said Act in entering its dismissal order of untimeliness.

Respondent moved to dismiss pleadings of the Petitioner and the District Court denied.

Respondent subsequently moved for summary judgment on the grounds of res judicata and the District Court granted.

Appellate Court found res judicata did not exist but found that the District Court did not act on the issue of untimeliness and appellate Court then acted in district Court's jurisdiction and decided the untimeliness issue with a decision that Respondent was entitled to the District Court's summary judgment on the grounds of untimeliness. .

## ARGUMENT

1. It is the contention of Petitioner that the Appellate Court departed from the usual course of judicial proceedings by deciding said issue of untimeliness which was before the District Court on petition for r view and to which the District Court had not adjudicated.

This departure is prohibited by the Railway Labor Act, as amended, 45 USCA Section 153 First(q); said paragraph (q) of said ACT permitting review in District Courts limits appellate review to issues adjudicated by the District Court.

Moreover, this departure has deprived Petitioner's grievance with the untimeliness term of the order entered by the First Division, National Railroad Adjustment Board for its Award No. 21787 from its Docket No. 42273 from being adjudicated by the District Court as contemplated by said paragraph (q) of said Act. Such deprivation has deprived Petitioner of due process of law as contemplated under said paragraph (q) of said Act.

2. Moreover, in support of this petition, Petitioner contends that the pleadings before the District Court show genuine issues as to material facts on timeliness for the District Court to decide, and , Rule 56(c), Federal Rules of Civil Procedure on summary judgment prohibits the granting of summary judgment as a matter of law when there are genuine issues as to material facts for the District Court to decide.

Wherefore, the writ should be allowed.

Respectfully submitted,

Robert E. Fingar
Petitioner.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that (2) two copies of the foregoing petition for writ of certiorari have been served to Mr. Gary A. Bubb, Suite 1014, Barnett Bank Building, Jacksonville, Florida - 32202-, counsel for the Respondent, this 2nd day of May, 1980, by United States Mail.

Robert E. Fingar
Petitioner
P. O. Box 552
Callahan, Florida
32011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 79 - 1491

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ROBERT E. FINGAR,

Plaintiff-Appellant,

versus

SEABOARD COAST LINE RAILROAD COMPANY, A VIRGINIA CORPORATION,

Defendant-Appellee.

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Appeal from the United States District Court
for the Middle District of Florida

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ON PETITION FOR REHEARING

( February 4, 1980 )

Before GOLDBERG, RONEY and TJOFLAT, Circuit judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Paul H. Roney
United States Circuit Judge.

FORM 703-2

Robert E. FINGAR,
Plaintiff-Appellant,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia Corporation,
Defendant-Appellee.

No. 79-1491
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Nov. 16, 1979.

Action was brought to review order of Railroad Adjustment Board denying relief for alleged grievances and for employment reinstatement. The United States District Court for the Middle District of Florida, Charles R. Scott, J., rendered summary judgment for employer, and plaintiff appealed. The Court of Appeals held that: (1) claim was time barred where not filed within appeal period specified in controlling labor agreement, and (2) decision in prior action involving seniority rights and denial of work assignments was not res judicata of instant claim.

Affirmed.

1. Labor Relations ⇐452

Where controlling labor agreement required that appeal from a superintendent's decision be taken within 45 days but employee waited 18 months after superintendent's denial before appealing to Railroad Adjustment Board, such claim was time barred. Railway Labor Act, § 3(i), 45 U.S.C.A. § 153(i).

2. Labor Relations ⇐452

Where prior action involved railroad employee's grievances concerning seniority rights and denials of work assignments, decision in such case was not res judicata of subsequent complaint of denial of reinstatement after termination for alleged insubordination, especially in view of assertion that dismissal was because of filing of the prior grievances. Railway Labor Act, § 3(q), 45 U.S.C.A. § 153(q).

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Appeal from the United States District Court for the Middle District of Florida.

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

In this action to review an order of the Railroad Adjustment Board (Board), 45 U.S.C.A. § 153(q), denying relief for alleged grievances and for employment reinstatement, plaintiff appeals the district court's grant of summary judgment for defendant, claiming the district court erred in ruling his claims were barred by *res judicata*. We find that plaintiff is not entitled to relief since the Board properly dismissed his claim for failure to timely pursue administrative remedies, even though we agree the district court improperly applied the doctrine of *res judicata*. Consequently, we affirm.

[1] Plaintiff's claims against his employer, Seaboard Coast Line Railroad (Seaboard), were presented to his superintendent pursuant to 45 U.S.C.A.

* Fed.R.App.P. 34(a); 5th Cir. R. 18.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

§ 153(i), on September 9, 1965. A letter denying relief was mailed on September 28, 1965. Eighteen months later, on March 27, 1967, plaintiff appealed to the Board for review of the superintendent's findings. The Board denied relief on December 3, 1971, because the appeal was not timely. Article 32(d) of the controlling labor agreement provided that appeals from a superintendent's decision had to be taken within 45 days. Plaintiff waited eighteen months after the denial letter before trying to appeal. In a different case regarding claims not involved here this Court previously held plaintiff to be bound by the terms of the labor agreement. *Fingar v. Seaboard Air Line Railroad Co.*, 277 F.2d 698, 700, 701 (5th Cir. 1960). Accordingly, plaintiff's claim is time-barred from review and the district court's summary judgment for defendant is due to be affirmed.

The district court had granted Seaboard's motion for summary judgment on grounds of *res judicata*, without mentioning the out of time appeal to the Board. The court found that the instant case and an earlier action involved the same parties and the same claims, and was therefore barred.

The earlier action involved grievances filed in 1964 and 1965 regarding seniority rights and denials of work assignments while plaintiff was a Seaboard employee. Seaboard rejected those grievances. The Board denied relief for failure to take a timely appeal and the United States District Court for the Middle District of Florida likewise denied relief.

[2] In the action here plaintiff, following his discharge for alleged insubordination, had presented additional grievances to Seaboard, seeking reinstatement and pay for work denied him just prior to his discharge. This was different from the claims made in the earlier actions, and not subject to the bar of *res judicata*.

> Under the doctrine of bar, a judgment in a prior suit between the same parties bars a second suit on the same cause of action not only as to all matters offered at the first proceeding, but also as to all issues that could have been presented either for or against recovery.

*Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594, 596 (5th Cir.), *cert. denied*, 434 U.S. 859, 98 S.Ct. 183, 54 L.Ed.2d 132 (1977).

The first action here involved grievances over seniority rights and denials of work assignments while plaintiff was still an employee of Seaboard. In the present case, plaintiff contests, among other things, his denial of reinstatement after termination for alleged insubordination. Plaintiff's complaints while still an employee involved matters in a different time frame than plaintiff's reinstatement claim. In fact, at one point in the instant action, plaintiff contended that he was dismissed *because* he persisted in filing the prior grievances against Seaboard. The claims asserted by plaintiff in the present action were distinct in time from those asserted in the first, and could not have been raised in the first administrative action. Accordingly, the present action is not barred by the first.

The court should have dismissed the claims because of an untimely appeal to the Board, rather than on *res judicata* grounds.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ROBERT E. FINGAR,

Plaintiff,

vs.

No. 73 - 413 - Civ - J - S

SEABOARD COAST LINE RAILROAD COMPANY. a Virginia corporation,

Defendant.

OPINION

Defendant has moved for summary judgment on the ground that plaintiff is barred from bringing this action by the principle of res judicata. In FINGAR v. United States RR.Retirement Board, 402 F. 2d 544 (5th Cir. 1968), the Court of Appeals affirmed a decision of the Railroad Retirement Board, denying plaintiff's claim for unemployment benefits. Likewise, in FINGAR v. SEABOARD COAST LINE RR. CO., 68 - 306 - Civ - J-M, plaintiff brought an action with highly similar allegations, seeking reinstatement, an award of lost seniority, and back pay. That case was dismissed on the merits, pursuant to Fed. R. Civ.P. 41(b), on February 27, 1969. In the present case, defendant contends that the affirmance by the Court of Appeals in FINGAR v. UNITED STATES RR. RETIREMENT BD., 402 F. 2d 544, and by this Court in FINGAR v. SEABOARD COASTLINE RR. CO., 68-306-Civ-J-M ( the appeal from which was dismissed by the Court of Appeals ), constitute a final adjudication on the merits of all litigated issues, and litigable issues, which stem from the same set of facts comprising plaintiff's claim. If that is so, then plaintiff is precluded from attempting to litigate issues that could have been raised, litigated, and decided in the earlier two cases.

The principle of res judicata in federal law is that, where a claim in a later case is identical

to the claim that was adjudicated in an earlier case; and where the parties in the later case are identical to, or in privity with, the parties in the earlier case, the judgment reached in the earlier case precludes the parties in the later case from attempting to relitigate that claim, including all issues pertaining to the claim, whether or not they were actually litigated in the earlier case. The essential elements of federal res judicata, therefore, are (1) two cases, (2) one of which has proceeded to judgment, (3) raising identical claims, (4) by the same parties or persons in privity with those parties. Lawlor v. National Scren Service Corp., 349 U. S. 322, 326, 99 L. Ed. 1122, 1126 (1955); Moch v. East Baton Rouge Parrish School Bd., 548 F 2d 594, 596 ( 5th Cir. 1977 ); International Ass!n. of Machinists & Aerospace Workers v. Nix, 512 F. "d 710, 715, 718 ( 5th Cir. 1975 ); Aerojet-General Corp. v. Askew, 512 F. 2d 125, 131 ( 5th Cir. 1975 ); American Heritage Life Ins. Co. v. Heritage Life Ins. Co.,494 F. 2d 3, 8, ( 1974 ). The doctrine of res judicata is premised on the principle of judicial finality, precluding the relitigation of a claim only after the same parties have had a reasonable opportunity to litigate that claim before a court of competent jurisdiction, and a final decision concerning the claim has been reached. Kaspar Wire Works v. Leco Engineering and Machine, Inc., 575 F. 2d 530, 537-38 (5th Cir. 1978 ); Stevenson v. International Paper Co., 516 F. 2d 103, 109 ( 5th Cir 1975 ).

Identity of Parties. Where the same claim has been decided in one case by the same parties for attempting to relitigate in a second case, those psrties, or persons in privity with them, are preclued from relitigating the claim. Under the common law, res judicata prevents by bar or merger the relitigation of a claim only by the same parties, or those in privity with them. Southwest Airlines Co. v. Texas Int'l Airlines, 546 F. 2d 84, 95 (5th Cir. 1977 ), cert. den. 434 U. S. 832, 54 L. Ed.2d 93 (1977 ).

In the present case, there is no question that plaintiff is the same individual who was plaintiff in Fingar v. United States RR. Retirement Bd., 402

F. 2d 544 (5th Cir. 1968), and in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M.

Identy of Claims . Res judicata is a principle of claim preclusion. Only if the claims in two cases are identical will the judgment in the first case prevent relitigation in the second case. The identy of claims raised in two cases, therefore, is an indispensable element for res judicata. International Ass'n. of Machinists & Aerospace Workers v. Nix, 512 F.2d at 131; American Heritage Life Ins. Co. v. Heritage Life Ins. Co., 494 F 2d at 9. In determing whether a claim in a later case is identical to that cited on a prior case, courts must look to the substance and subject matter of two cases, not their appearance. Courts must look past the mere language and labels of the pleadings, beyond the legal theories devised and advanced, to discern the nature of the actions. Aerojet-General Corp. v. Askew 511 f. 2d at 715; Astron Industrial Assoc., Inc. v. Chrysler Motors Corp., 405 F. 2d 958, 961 (5th Cir. 1968); Acree v. Airline Pilot's Ass'n., 390 F. 2d 199, 201 (5th Cir. 1968); cert. den. 393 U. S. 852, 21 L. Ed. 2d 122 (1968). " It is the substance of action that counts. " Acre v. Airline Pilots Ass'n., 390 F. 2d at 201. cf. Wilson Cyprus Co. v. Atlantic Coastline Ry. Co., 109 F. 2d 623, 627 (5th Cir. 1940 ), cert. den., 310 U. S. 653, 84 L. Ed. 1418 (1940). The test for determing whether two cases involve an identical claim, already decided in one of those cases, involves three questions: (1) is the same right infringed by the same wrong in both cases? (2) would a different judgment in the second case impair rights that were established and protected by the judgment in the first case ? (3) would the same evidence sustain both the judgment in the first case and the judgment in the second ? Aerojet-General Corp. v. Askew, 511 F 2d 718; Astron Industrial Assoc., Inc. v. Chrysler Motors Corp., 405 F. 2d at 961; Acree v. Airline Pilots Ass'n., 390 F. 2d at 201.

Under that test, it becomes clear that the genuine nature of this case, and of Fingar v. Seaboard Coastline RR.Co., 68-306-Civ-J-M, are essentially and in substance the same. The same rights, alledged to have been infringed, are sought to be redressed in both cases: the right to back pay and to lost seniority.

The fact that plaintiff in the case at hand proceeds solely on his own behalf, while in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M,/ he purported to represent a class of plaintiffs, does not alter in any way the character of Plaintiff's rights that he seeks to enforce. In the earlier case, Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, Judge McRae dismissed the case on the merits. Pursuant to Fed. R. Civ. P. 41(b) that dismissal was with prejudice. For this same Court to now hold differently in the present case, would clearly impair the rights and duties of both plaintiff and defendant that were established and protected by the dismissal on the merits in that earlier case. Finally, there could be little question that the same evidence would support the final order of dismissal on the merits in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, and the Court's decision in this case. In his memorandum of law, filed June 7, 1974, plaintiff acknowledges that his separate lawsuits are generated by, and derived from, the same intrinsic set of fact; but he asserts that the actions are for a different purpose. Founded squarely upon the same intrinisic set of facts, it is indisputable that the facts in the present case could readily be substituted for the evidentiary facts alleged in the earlier case, Fingar v. Seaboard Coastline RR. Co., 68-306- Civ-J-M, and the law would still reuire the same decision in that case. The law, therefore, dictates that the same decision of dismissal on the merits should be reached in the present case. Thus, the Court concludes that the claim presented and decided in Fingar v. Coastline RR. Co.68-306-Civ-J-M is essentially identical to the claim in the case at hand.

Having concluded that plaintiff and defendant are identical in in the same procedural posture in the present case, and in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, and that the same claim in substance is raised in both cases, the Court holds that the final decision of dismissal on the merits, reached in Fingar v. Seaboard Coastline RR. Co., 68-306-Civ-J-M, is necessarily conclusive and binding on the claim in the present case.

In short, the Court holds that the principle of res judicata applies to bar litigation of plaintiff's claim in this case, inasmuch as it would be an attempt to relitigate the claim, together with all issues that were actually litigated, or could have been litigated, in Fingar v. Seaboard Coastline RR.Co., 68-306-Civ-J-M. As a result, plaintiff is estopped from attempting to relitigate any of those issues in the present case. Accordingly, a summary final judgment shall be issued on behalf of defendant.

ISSUED at Jacksonville, Florida, this 27th day of December, 1978.

(s) Charles R. Scott
Senior United States District Judge

FORM 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
With Referee Byron R. Abernathy

Award 21787

Docket 42273

PARTIES ( Robert E. Fingar
TO (
DISPUTE (
( Seaboard Coastline Railroad Company

STATEMENT OF CLAIM:

" Herein, Claims (A), (B) and (C) are made by Florida Divisions' Switch Engineer Robert Edwin Fingar who hereinafter will also be referred to as claimant and/or petitioner and who has obtained establishment of a seniority date as a Florida Divisions' Switch Engineer by the claimant's vested standing on the Florida Divisions' Yard Engineers' Seniority Roster after promotion to switching service on December 31, 1955 from the position of Florida Divisions'Switch Fireman and which was obtained December 25, 1949 by the claimant's standing on the Florida Divisions' Yard Firemen Seniority Roster. "

" CLAIM (A):

Claim is made for the reinstatement of the claimant Robert Edwin Fingar to the service of the Florida Divisions' of the Seaboard Air Line Railroad Company, now known as the Seaboard Coast Line Railroad Company, which hereinafter will be also referred to as carrier and/or respondent, with all seniority and all vested employment rights unimpaired and with all pay at the yard rate for engineers for all time lost beginning with June 1, 1965 and for all subsequent dates until the claimant is reinstated by the provision of Article 31 of the Engineers Schedule and of the Firemen and Hostlers Schedule. This claim is due to the fact, that, the claimant was wrongfully discharged, at 7:10 p. m., on June 1, 1965, from the service of

the carrier and respondent Seaboard Air Line Railroad Company for the charge, without fact, of vio- of Rules 702, 703 and 950, for a supposedly violation of so-called instructions supposedly extended to the claimant bt so-called letters supposedly written by Superintendent L. C. Bates of February 26, 1963, February 7, 1 964, and Superintendent C. H. Cook's so-called letter of May 6, 1965, at which time, claimant supposedly was so-called advised to discontinue this supposedly practice of so=called filing claims, which supposedly, had no so-called contractual basis, and, to persist, would be considered a so-called act of insubordination. Claimant, supposedly, filed such so-called claims April 1 and April 8, 1965. "

CLAIM (B) :

" Claim is made by the claimant for one yard day at the yard rate for engineers for each of the following dates beginning with March 1, 1965 through April 15, 1965 and for all of the subsequent dates on which he is denied the engineer's position on the No. 2 Fernandina Switch Engine Assignment and/or denied the engineer's position on the locomotive assigned to and/or inducted to run on Fernandina yard, Florida for the purpose of performing all switching work, other than doubling the head end of a train over where one track will not hold the entire train, at and within the switching limits of Fernandina Yard, Florida."

" CLAIM (C): Claim is made by the claimant for one yard day at the yard rate for engineers for each of the following dates beginning with April 1, 1965 through May 15, 1965 and for all subsequent dates on which he is denied the engineer's position on the 2nd Lake Wales Switch Engine Assignment ans/or denied the engineer's position on the locomotive assigned to and/or inducted to run on Lake Wales Yard, Florida for the purpose of performing all switching work, other than doubling the head end of a train over where one track will not hold the entire train, at and within the switching limits of Lake Wales Yard, Florida.

FINDINGS : " The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction. "

" Hearing was held. "

" The record here stands unrefuted that the claimant was dismissed from the service of this carrier effective July 26, 1965; that the claims herein under consideration identified as Claims (A), (B) and (C), were presented to the Superintendent on September 9, 1965; that conference on these claims was held on September 24, 1965; that the Superintendent thereafter rendered his decision on September 28, 1965, denying all such claims; and that no appeal was taken from the Superintendent's decuntil March 27, 1967, some one and one-half years later. "

" Article 32(d) of the controlling BLE Agreement provides that;

> "(d) Engineers shall have the right to appeal to the next ranking officer, provided such an appeal be made in writing within forty-five (45) days after the Superintendent has rendered his decision to the engineer or the engineer's local committee. "

" Claimant's appeal from the Superintendent's decision of September 28, 1965, therefore was not timely made, and these claims are not now properly before this Board. Accordingly these claims must be dismissed for want of jurisdiction. "

"AWARD: Claims dismissed. "

National Railroad Adjustment Board, by order of the First Division. "